

Memorandum



Date: April 16, 2008

To: Honorable Chairman Bruno A. Barreiro
and Members, Board of County Commissioners

From: George M. Burgess
County Manager

Subject: Supplemental Information: Protest Regarding Recommendation for Approval to Award Contract No. 8481-2/22: Automated Fare Collection System for Transit Department

Supplement to
Agenda Item No. 3(D)

The supplemental information is provided to inform the Board of County Commissioners (Board) of a bid protest which was filed on March 4, 2008 in response to the award recommendation of Contract No. 8481-2/22 to Cubic Transportation Systems, Inc. ("Cubic"). The protest was heard by a Hearing Examiner on March 21, 2008. The Hearing Examiner's findings are attached.

The Hearing Examiner found that the County did not violate the terms of the RFP, did not act arbitrarily and capriciously in determining that Cubic's proposal was responsive, and was not unreasonable in its determination to negotiate with Cubic. Accordingly, the Hearing Examiner recommends that the Miami-Dade County Board of County Commissioners deny the bid protest and accept my original recommendation to award the contract to Cubic Transportation Systems, Inc.

A handwritten signature in cursive script, appearing to read "George M. Burgess".

Assistant County Manager

HARVEY RUVIN, CLERK OF THE BOARD

IN RE: THE PROTEST OF MARCH 4, 2008
RECOMMENDATION OF AWARD OF
CONTRACT FOR RFP NO. 8481-2/22
PROCUREMENT OF AUTOMATIC FARE
COLLECTION SYSTEM

SCHEIDT & BACHMANN USA, INC.,

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent,

and

CUBIC TRANSPORTATION
SYSTEMS, INC.,

Intervenor.

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FINDINGS OF FACT AND
RECOMMENDATION OF HEARING OFFICER

The above-styled protest filed by Scheidt & Bachmann USA, Inc. ("S&B") was referred to the undersigned Hearing Examiner. Cubic Transportation Systems, Inc. ("Cubic"), the recommended bidder, filed an Unopposed Motion to Intervene in this matter. A Hearing was conducted on March 21, 2008, commencing at 9:30 a.m. at the Stephen P. Clark Center, 10th floor CITT conference room, 111 N.W. 1st Street, Miami, Florida 33128. At that time, Cubic's Unopposed Motion to Intervene was granted, and the recommended bidder became a party to the proceedings.

I. JURISDICTION AND STANDING

The Hearing Examiner has jurisdiction over this matter pursuant to Section 2-8.4 of the Miami-Dade County Code of Ordinances. Said provision of the Code authorizes the Hearing Examiner to consider the written bid protest and supporting documents and evidence appended thereto of any protestor, as well as arguments from counsel and other witness testimony presented at the time of hearing.

The undersigned finds that S&B was the second highest bidder on the above-referenced competitive solicitation, and therefore, has standing to contest the Manager's recommendation, unless specific issues of protest are barred by ordinance, or case law. *See Preston Carroll Company, Inc. v. Florida Key Aqueduct Authority*, 400 So.2d 524 (Fla. 3d DCA 1981).

II. STATEMENT OF THE ISSUES

The issue in this bid protest is whether in making a recommendation to award this contract to the highest ranked proposer, Miami-Dade County acted in a manner that was illegal, fraudulent, oppressive, or indicated misconduct on the part of the County, *Miami-Dade County v. Church and Tower, Inc.*, 715 So.2d 1084, 1088-9 (Fla. 3d DCA 1998); or, whether the decision is arbitrary and capricious, *Intercontinental Properties, Inc. v. Dept. of Health and Rehabilitative Services*, 606 So.2d 390 (Fla. 3d DCA 1992). S&B has failed to make this showing and accordingly, the Hearing Examiner recommends that the Miami-Dade County Board of County Commissioners accept the County Manager's recommendation to award the contract to Cubic.

III. FINDINGS OF FACT

1. On or about September 20, 2007, the County issued the Request for Proposals ("RFP") soliciting a qualified firm to provide a service proven, state-of-the-art automated fare collection system ("AFC System") to the County. *See* RFP § 1.1.

2. The RFP is very clear that the County was not necessarily seeking the lowest priced proposal; that other criteria such as experience, qualifications, and a demonstrated service-proven system are essential considerations. Additionally, the RFP contemplated that significant negotiations were to follow the evaluation process. The RFP stated that, "[e]xcept in areas where MDC feels that specific requirements are necessary for patron service or operational considerations, this specification is intended to be functional in nature. Alternatives that enhance the functionality or security of the design presented herein, or that shall reduce the life cycle of the AFC system, shall be considered, subject to approval by MDC." *See* RFP Section 2 System Design. Thus, the express language of the RFP anticipated a process of negotiation.

3. The County received three proposals ("Proposals") in response to the RFP from Cubic, S&B and ACS Transport Solutions, Inc., a third vendor which is not involved in this Protest.

4. Cubic's Proposal contained a statement that Cubic's technical approach and pricing would be negotiated to mutually acceptable terms for a number of listed items including liquidated damages, warranty and payments.

5. S&B's Proposal contained 65 specific exceptions to the terms of the RFP including a statement, similar to Cubic's, that it expected to negotiate these items to the mutual satisfaction of the parties.

6. S&B took exception to terms governing, among other things, the project schedule, liquidated damages, warranties, software licenses, and payments. S&B also proposed a system that did not fully meet the RFP requirement that the AFC System be UTFS Part II compliant.

7. On November 2, 2007, following an evaluation of all three Proposals by staff and the Selection Committee, Cubic's Proposal was ranked highest.

8. In a November 9, 2007, letter to the County, S&B alleged that Cubic's Proposal was non-responsive, because it contained a general statement regarding negotiations rather than specific exceptions.

9. On November 14, 2007, the County Attorney issued an opinion finding that Cubic's Proposal was in fact responsive to the RFP. *See County Attorney's Opinion.*

10. At petitioner's request, on November 16, 2007, the County reconvened the Selection Committee for an oral presentation and re-ranking. All proposers were given the opportunity to clarify their Proposals. Cubic and S&B accepted the offer to participate in oral presentations, while ACS Transport Solutions, Inc. respectfully declined. Following the oral presentations, the Selection Committee again ranked Cubic's Proposal highest.

11. Pursuant to the RFP § 4.5, the Committee recommended negotiations with Cubic, the highest ranked proposer.

12. Following the Committees recommendation and the instructions in the RFP § 4.5, the County Manager instructed the MDT negotiating Team to first negotiate with Cubic, the highest ranked proposer, and if an agreement could not be reached the negotiation team were to initiate negotiations with the next highest ranked proposer.

13. Following the Selection Committee's recommendation and the County Manager's instructions, the MDT negotiating team, under the guidance of the County's professional procurement staff and the County Attorney, negotiated the Contract with Cubic.

14. S&B alleges in its protest that (1) Cubic's Proposal was non-responsive, (2) the County acted arbitrarily by not choosing to negotiate with S&B and (3) the County violated the terms of the RFP by negotiating terms of the Contract with Cubic which S&B alleges were not subject to negotiation.

IV. GOVERNING LEGAL STANDARDS

Well established Florida Law recognizes that a public body has wide discretion in soliciting and accepting bids for public improvements. When based on an honest exercise of this discretion it will not be overturned by a court absent a showing of illegality, fraud, oppression or misconduct. *See Liberty County v. Baxter Asphalt*, 421 So.2d 505 (Fla. 1982); *Central Florida Equipment Rentals of Dade County, Inc. v. Dunn Co.*, 586 So.2d 1171 (Fla. 3d DCA 1991); *see also Department of Transportation v. Grove-Watkins Constructors*, 530 So.2d 912 (Fla. 1988).

The protesting bidder has the burden to prove that it has standing to allege a deficiency of all bidders in line before it, and that the alleged deficiencies are material. *See Robinson Electric Company, Inc. v. Miami-Dade County*, 417 So.2d 1031 (Fla. 3d DCA 1982); *see also Preston Carroll Company, Inc. v. Florida Keys Aqueduct Authority*, 400 So.2d 524 (Fla. 3d DCA 1981).

V. CONCLUSIONS OF LAW

The Hearing Examiner finds no evidence to conclude that the actions of the County were the result of fraud, coercion, collusion or similar inappropriate conduct. Moreover, the Hearing Examiner finds that Miami-Dade County complied with the clear terms of the RFP.

First, as determined by the County Attorney, Cubic's Proposal was responsive to the RFP. S&B previously raised the same responsiveness arguments it raises here, and they were considered and disposed of by the County Attorney. Pursuant to § 2-8.4 of the Miami-Dade County Code, the issue of whether a proposal is responsive is determined solely by the County Attorney, whose decision is final and binding on the County Commission. *See* Section 2-8.4 of the Code. The County Attorney reasoned that the RFP contemplates negotiation of the terms of the Contract and that Cubic's "qualification" was essentially an acknowledgment of that fact. Accordingly, Cubic's Proposal is responsive

Second, the County did not violate the terms of the RFP by not choosing to negotiate with S&B.. The RFP makes clear that price is not the sole determining factor. Cubic was the highest ranked proposer and the RFP clearly states that the County would negotiate first with the highest ranked proposer. Accordingly, the County complied with the RFP and the decision to negotiate with Cubic cannot be said to be arbitrary, much less fraudulent or illegal.

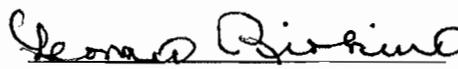
Finally, the County did not violate the terms of the RFP by negotiating terms of the contract with Cubic which S&B alleges were not subject to negotiation. Testimony of the County witnesses revealed that the alternatives proposed by Cubic were comparable

to what the County desired in the RFP, were advantageous to the County and did not confer a competitive advantage to Cubic. Additionally, many of the terms that S&B indicated the County should not have negotiated with Cubic were the same terms that S&B indicated a desire to negotiate. For example, S&B's witnesses testified that S&B does not currently offer a service proven, UTFS compliant smart card system. Accordingly, S&B could not comply with the RFP if it was interpreted as strictly as S&B advocated in its protest.

VI. RECOMMENDATION

Based on the foregoing, it is RECOMMENDED that the Miami-Dade County Board of County Commissioners deny the bid protest and accept the County Manager's recommendation to Award the Contract to Cubic Transportation Systems, Inc.

DONE AND ENTERED this 31 day of March, 2008, in Miami, Miami-Dade County, Florida.


Judge Leonard Rivkind
Hearing Examiner